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IN THE

Supreme Court of the United States

October Term, 1968
No. [redacted] 136

FRANCISCO PEREZ and JOAN FAE SCHIFFILER,
Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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IN THE

Supreme Court of the United States

October Term, 1967
No. .....

FRANCISCO PEREZ and JOAN FAE SCHIFFILER,
Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California denying a petition for writ of habeas corpus, entered in the above-entitled case on February 8, 1968.

Opinions Below.

Memorandum Decisions of the Appellate Department of the Superior Court of the State of California, for the County of Los Angeles, affirming the judgments of the trial court is attached hereto as Appendix "A". There are no other written opinions by the state courts below.

The order of the California Supreme Court denying the Petition for Writ of Habeas Corpus is set forth hereinafter as Appendix "B".

Jurisdiction.

1. The judgment of the California Supreme Court was made and entered on February 8, 1968.

2. No rehearing was sought in the court below and no extension sought in this Court within which to petition for certiorari.

3. The statutory provisions believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari are 28 U.S.C. 1257(3) and Rule 22(3) of the Rules of the United States Supreme Court.

Questions Presented.

1. Whether entertainment and dancing fall within the protection of the First Amendment to the United States Constitution.

2. Whether subsection (w) of Section 30,005 and subsection V of Section 60,002 of the Hawaiian Gardens Municipal Code, are on their face and as applied an attempt to prohibit the type of entertainment engaged in by petitioners by the imposition of a license fee which is unreasonable and oppressive in violation of due process of law.

3. Whether the licensing provisions of the City of Hawaiian Gardens Municipal Code are unconstitutionally vague and unseverable from the invalid permit provisions of the Hawaiian Gardens Municipal Code.

Constitutional Provisions Involved.

The First Amendment to the United States Constitution provides in pertinent part:

> ". . . shall make no law . . . abridging the freedom of speech, . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved.

1. The First Amendment and the Fourteenth Amendment to the United States Constitution.

2. Subsection (w) of Section 30,005 of Chapter 3 of Article X of the Hawaiian Gardens Municipal Code which reads as follows:

> "w. Topless Entertainment as Defined in subsection V of Section 60,002 of Chapter 6 of Article X of the Hawaiian Gardens Municipal Code."

3. Section 30,003 of Chapter 3 of Article X of the Hawaiian Gardens Municipal Code which reads as follows:

> "PERMIT FEE. Unless otherwise stated in this Chapter, the fee for filing an application for a permit pursuant to this Chapter shall be Fifteen ($15.00) Dollars payable in advance. The license fee prescribed in Chapter 5 of this Article for the particular business and the permit fee shall accompany the application."

4. Subsections C and V of Section 50,002 of Chapter 6 of Article X of the Hawaiian Gardens Municipal Code which reads as follows:

> "C. Cocktail Lounge, Beer Bar—Sixty-five Dollars ($65.00) per year plus One Hundred Dollars ($100.00) per year for dancing or entertainment in conjunction therewith.

"V. Topless entertainment. Notwithstanding any provisions of subsection C of this Section, the license fee for entertainment which includes "topless entertainment" as hereinafter defined shall pay a license fee of $1,000.00 per annum. In the case of entertainment which is defined herein as "topless entertainment" in conjunction with cocktail lounges or beer bars as referred to in subsection C, the license fee of $1,000.00 per annum shall be in place of the entertainment license fee of $100.00 referred to in said subsection for entertaiment other than topless entertainment.

"For the purpose of this Article (Article X), topless entertainment shall mean any act, play, review, pantomime, scene, song, dance act or song and dance act, participated in by one or more employees, guests, customers or any other person or costume, garment or other device or apparel which reveals the nipple or areola of the breast (mammary gland), or any portion of such breast (mammary gland) below the upper edge of the areola, or any part of her pubic or anal areas, or the lower half of her buttocks, whether such flesh be uncovered or covered by a mesh, transparent or similar material or covering; topless entertainment shall also include the use, employment or presence of waitresses, barmaids or any other employees or persons in any business establishment, where any such female employee appears in a costume, garment or other device or apparel which reveals the nipple or areola of the breast (mammary gland) or any portion of such breast (mammary gland) below the upper edge of the areola, or of any part

of her pubic or anal areas, or the lower half of her buttocks, whether such flesh be uncovered or covered by a mesh, transparent or similar covering."

5. Section 20,000 of Chapter 2 of Article X which reads as follows:

"COMPLIANCE REQUIRED. No person shall commence or carry on, either directly or indirectly, any business, profession or trade or occupation as hereinbefore defined within the City of Hawaiian Gardens, whether or not said person has a fixed place of business within the City of Hawaiian Gardens or elsewhere without complying with the terms and the provisions of the Business License Law. The Business License Law contains both revenue and regulatory measures. The provisions herein contained prohibiting or regulating certain types of businesses, requiring the issuance of permits, requiring the registration of certain businesses and otherwise imposing regulations in respect to the conduct of businesses are regulatory. Any person violating any of the provisions of the Business License Law or knowingly or intentionally misrepresenting to any authorized officer of the City any material fact in procuring a license or permit herein provided for, shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by fine of not more than $500.00 or by imprisonment in the City Jail or the County Jail of Los Angeles County for a period of not more than six months or by both fine and imprisonment."

Statement of the Case.

Each petitioner herein was brought to trial upon verified complaints filed in the Municipal Court of the State of California, County of Los Angeles, Los Cerritos Judicial District, charging each petitioner with a violation of Section 20,000 (in conjunction with subsection (w) of Section 30,005 of Chapter 3 of Article X) of the City of Hawaiian Gardens Municipal Code, a misdemeanor. The trial court overruled petitioners' demurrers to the complaints on the grounds that the sections of the City of Hawaiian Gardens Municipal Code alleged to have been violated are unconstitutional on their face and as applied to petitioners.

On April 13, 1967, the Municipal Court cases were consolidated for court trial before the Honorable Roberta Butzbach, Judge of the Municipal Court of the Los Cerritos Judicial District; said trial was submitted to Judge Butzbach on stipulated facts as follows:

> "1. That the place of business doing business as 'ENJOYS' located at 21509 Norwalk Boulevard, is within the City of Hawaiian Gardens, County of Los Angeles, State of California.
>
> "2. That said place of business, 'ENJOYS,' at all times relevant did not have a TOPLESS ENTERTAINMENT PERMIT as defined by City of Hawaiian Gardens Ordinance No. 50, a true copy of which was introduced into evidence.
>
> "3. A true copy of Ordinance No. 6, entitled 'AN ORDINANCE OF THE CITY OF HAWAIIAN GARDENS ADDING ARTICLE X OF THE HAWAIIAN GARDENS MUNICI-

PAL CODE ESTABLISHING A BUSINESS LICENSE LAW FOR THE CITY OF HAWAIIAN GARDENS,' consisting of Chapters 1, 2, 3, 4, 5 and 6 consisting of Section 10,000 through 60,002, together with a true copy of City of Hawaiian Gardens Ordinance No. 35, entitled 'AN ORDINANCE OF THE CITY OF HAWAIIAN GARDENS AMENDING SECTION 10,004.16a of Ordinance No. 6' were introduced into evidence.

"4. (a) That Los Angeles County Deputy Sheriff Jack Lass was deemed to have been called as a witness for the People and deemed to have testified that on the date of issuance of the citation to defendant FRANCISCO PEREZ, Lass observed a female in the 'ENJOYS' bar dancing to the accompaniment of juke box music while on a stage and that she was nude from the waist up; that Lass engaged defendant FRANCISCO PEREZ in conversation and was told by PEREZ that he was the manager of the location and knew that there was no TOPLESS ENTERTAINMENT PERMIT for the 'ENJOYS' bar; but was allowing the conduct herein described;

"(b) That on the date of issuance of the citations to defendant JOAN FAE SCHIFFILER aka TRACY SINCLAIR, said defendant engaged in conduct as follows: she danced on a stage to the accompaniment of juke box music and she was nude from the waist up at said time.

"(c) Plaintiff contends that without a permit said conduct of defendant is a violation as charged in the complaint.

"(d) Defendant contends that Section 30,005 (w) is unconstitutional on its face and as applied to defendant; therefore, there is no violation of Section 20,000 as charged in the complaint."

On April 13, 1967, Judge Butzbach found each of the defendants and petitioners guilty of a violation of Section 20,000 of the Hawaiian Gardens Municipal Code; on May 4, 1967, Judge Butzbach rendered the following sentences for the indicated defendant and petitioner:

(a) FRANCISCO PEREZ

Ninety (90) days in the county jail suspended and placed on two years probation; condition of probation pay $150.00 fine.

On May 10, 1967, Judge Butzbach rendered the following sentence for defendant and petitioner JOAN FAE SCHIFFILER aka TRACY SINCLAIR in the following cases:

(a) Case No. M 26747
Fifty (50) days or $500.00;
Forty (40) days or $400.00 suspended.

(b) Case No. M 26786
Fifty (50) days or $500.00;
Forty (40) days or $400.00 suspended.

(c) Case No. M 26551
Fifty (50) days or $500.00;
Forty (40) days or $400.00 suspended.

(d) Case No. M 26782

First thirty (30) days in County Jail and two (2) years probation upon condition that other employment be sought and be law abiding.

Appeals by each of the defendants and petitioners herein were taken from said trial court judgments to the APPELLATE DEPARTMENT OF THE SUPERIOR COURT IN THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES as follows:

People v. Perez, Superior Court No. CR A 7709; trial court No. M 26350.

People v. Schiffiler, Superior Court No. CR A 7710; trial court No. M 26651.

People v. Schiffiler, Superior Court No. CR A 7711; trial court No. M 26747.

People v. Schiffiler, etc., Superior Court No. CR A 7712; trial court No. M 26782.

People v. Schiffiler, Superior Court No. CR A 7713; trial court No. M 26786.

On December 27, 1967, judgment in each of the cases numbered CR A 7709, CR A 7710, CR A 7711 and CR A 7712 was affirmed; the appeal from judgment in case No. CR A 7713 was treated as an appeal from order granting probation and was affirmed on said date. A true copy of the Memorandum Opinion and Judgment is attached hereto, marked Appendix "A" and made a part hereof as though set out in full. Defendants and petitioners herein filed a PETITION FOR REHEARING OR CERTIFICATION TO THE COURT OF APPEALS on or about January 2, 1968, with the said APPELLATE DEPARTMENT OF THE SUPERIOR COURT and on January 10, 1968, said petition was denied and the order filed by said APPELLATE DEPARTMENT.

On January 15, 1968, the Court of Appeal, Second District, denied petitioners' Petition for Writ of Habeas Corpus.

On February 8, 1968, the California Supreme Court denied petitioners' Petition for Writ of Habeas Corpus. This Petition for Writ of Certiorari is being made from said denial.

On February 27, 1968, the trial court on motion of petitioner Schiffiler stayed execution of sentence until April 19, 1968.

How the Federal Question Was Raised.

A. In the Trial Court.

It was petitioners' contention before the trial court that the Hawaiian Gardens Municipal Code as applied herein to petitioners was unconstitutionally vague and imposed for activity protected by the First Amendment a license fee that is unreasonable and oppressive in violation of due process of law. The trial court held the code was validly applied.

B. In the Court Below.

Each petitioner appealed to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles from the judgments of conviction. On December 17, 1967, the judgments were affirmed. On January 25, 1968, the Court of Appeal, Second District, denied petitioners' Petition for Writ of Habeas Corpus. On February 8, 1968, the California Supreme Court denied petitioners' Petition for Writ of Habeas Corpus. In each instance, petitioners raised issues presented herein.

REASONS FOR GRANTING THE WRIT AND ARGUMENTS AMPLIFYING THE SAME.

I.

Entertainment and Dancing Are Forms of Expression Protected Under the First Amendment.

It is settled that the constitutional protection of freedom of expression includes not only the exposition of ideas, but entertainment and amusement as well.

Winters v. New York, 333 U.S. 507 (1947);

Weaver v. Jordan, 64 Cal. 2d 235, 49 Cal. Rptr. 537 (1966).

It is stated in *Winters,* that:

> "The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best literature."
>
> *Winters v. New York, supra,* 333 U.S. 507, 510.

Citing *Winters,* the California Supreme Court recently expressed that:

> "Also encompassed (within the right of freedom of speech and press) are amusement and entertainment."
>
> *Weaver v. Jordan, supra,* 64 Cal. 2d 235, 242.

Other local ordinances have also defined the mere use of "topless" barmaids as entertainment.

People v. Foley, Cr. A. 7278-7280 (1967) (Los Angeles Sup. Ct. App. Dept.);

People v. Kukkanen, Cr. A. 7217-7220 (transfer denied by C.A.) (1967) (Los Angeles Sup. Ct. App. Dep.);

Robins v. County of Los Angeles, 248 A.C.A. 611;

People v. Jordan, Cr. A. 6645 (Los Angeles Sup. Ct. App. Dept.).

In *Adams Newark Theater Co. v. City of Newark,* 120 A. 2d 496 (reversed on other grounds), the owner of a burlesque theater brought an action challenging the constitutionality of a city ordinance prohibiting certain types of performances. In considering this question, the Court remarked at page 498 that:

> "The rights guaranteed by the First Amendment and by our State Constitution are, beyond dispute, applicable to the commercial exhibition of plays and shows and the type of exhibition which the plaintiff herein staged, are shows in every sense of the word being so called burlesque shows."

This principle was reaffirmed in *City of Newark v. Humphres,* 228 A. 2d 550.

The mere fact that commercial activity is involved in the instant case ". . . is in itself, no justification for narrowing the protection of expression secured by the First Amendment."

Ginzburg v. U.S., 86 S. Ct. 942, 949; also see

New York Times Co. v. Sullivan, 376 U.S. 254, 265-266, 86 S. Ct. 710, 718;

Smith v. People of the State of California, 361 U.S. 147, 150, 80 S. Ct. 215, 217;

Weaver v. Jordan, supra.

II.

Subsection V of Section 60,001 and Subsection (w) of Section 30,005 of the Hawaiian Gardens Municipal Code are Unconstitutional on Their Face and as Applied in That They Attempt to Prohibit the Type of Entertainment Engaged in by Petitioners by the Imposition of a License Fee Which Is Unreasonable and Oppressive.

The general rule has often been stated that license fees in ordinary commercial regulations are presumed valid and the party attacking the validity has the burden of proving the contrary. However, the burden shifts when the restriction is not on mere commercialism, but on a First Amendment right of free expression.

> "Where, as here, a municipal ordinance imposes a fee which threatens to interfere with a right guaranteed by the First Amendment, the burden of proving the reasonableness of that fee rests with those seeking to enforce it."
>
> *Chester Branch, N.A.A.C.P. v. City of Chester,* 253 F. Supp. 707 (1966); see also
>
> *Busey v. District of California,* 138 F. 2d 592.

It is petitioners' position that Hawaiian Gardens Ordinance No. 50 interferes with the constitutional right of free expression. The true purpose and effect of said Ordinance is to prohibit petitioners and others from providing "topless" dancing. The City of Hawaiian Gardens has classified topless dancing as "entertainment" (Section 60,002(V)). Entertainment and danc-

ing are forms of expression protectible under the First Amendment.

Winters v. New York, 333 U.S. 507 (1947);

Weaver v. Jordan, 64 Cal. 2d 235 (1966);

Adams Newark Theater Co: v. City of Newark, 120 A. 2d 496 (burlesque shows).

Therefore, it is the People's burden to prove the true purpose and effect of Hawaiian Gardens Ordinance No. 50 is not prohibitory, restrictive, and violative of the Federal and State Constitutions.

"In ascertaining the purpose of the ordinance, we are not bound by the license label affixed to the measure."

People v. Jordan, Appellate Department Superior Court Los Angeles, Cr. A. 6645 (1966).

The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are under a solemn duty to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.

Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205;

Ex parte Whitwell, 98 Cal. 78, 32 Pac. 70, 19 L.R.A. 727, 35 Am. St. Rep. 152.

The courts have held that the baring of the female breast or "topless" entertainment *per se* is not prohibited by law. In the *In re Davis,* 242 A.C.A. 760 and *Robins v. County of Los Angeles,* 248 A.C.A. 611 (1967) cases, the court emphasized with respect to topless entertainment that:

"Since respondents allegedly conduct within the County of Los Angeles lawful businesses, they

> may be subjected to business license requirements which are *reasonably calculated to regulate rather than prohibit* the *entertainment activity.*"

Yet, looking at the real purpose and effect of Ordinance No. 50, we see that the City of Hawaiian Gardens is attempting to accomplish indirectly what it cannot accomplish by direct action—the prohibition of "topless" entertainment by the imposition of an unduly oppressive license fee.

It is well established that licenses may be required by a city where the nature of the business requires special qualifications or where they are issued as a means of raising revenue for municipal purposes; but they cannot be required as a means of prohibiting any of the advocations of life which are not injurious to public morals.

> *In re Quong Woo* (1882), 13 Fed. 229;
>
> *Ex parte Dees* (1920), 50 Cal. App. 11, 194 Pac. 717.

The facts of *Ex parte Dees, supra,* are strikingly similar to those facts of the case at bar. The court held that an Ordinance imposing a license tax of $300.00 a month on the business of selling theater tickets elsewhere than at the theater office, was unreasonable, oppressive, lacking in impartiality, and unfair in view of the wide disparity between the tax and those levied on other and somewhat kindred lines of business, especially since the ordinance declared the business unlawful except upon the condition of prior procurement of the license. The ordinance also sought to reach the employees of those engaged in the business. Section 60.-002 (A-V) of the Hawaiian Gardens Municipal Code

requires a $100.00 license fee per year for dancing or entertainment in conjunction with a cocktail lounge or beer bar. However, if "topless" females conduct said dancing or entertainment the license fee is $1,000.00. It is submitted that this is a patently unreasonable classification. The sum of $1,000.00 bears no reasonable relationship to regulation of lawful entertainment activity, but can only be construed as a bold attempt to prohibit such entertainment.

In *Ex parte Dees, supra,* the court stated at page 719:

> "Even though the power to license for revenue be upheld, it is not a power to prohibit."

The court stated further at page 720:

> "It is impossible to consider the wide disparity between a proposed tax of $300.00 per month and the other taxes levied on other and somewhat kindred lines of business, without reaching the conclusion that, considered as a taxing ordinance, it is unreasonable, oppressive, lacking in impartiality and unfair. . . ."

In *Ex parte Hall* (1920), 50 Cal. App. 786, 195 Pac. 975, the Court stated:

> "It is for the lawmaking body to determine when an exigency exists for the exercise of the police power, but what are the subjects of its exercise is clearly a judicial question . . . If it passes an ordinance obstensibly in the exercise of police power, which in fact interferes unnecessarily with the personal liberty of the citizen, the Courts have a right to examine the law and see whether it relates to the objects which the exercise of the police power is designed to secure, and whether it is appropriate for the promotion of such object."

In *Roe v. Commonwealth* (1966), 485 S.W. 2d 25, the Kentucky statute read:

> "No person may operate a nudist camp unless he first secures a license from the Department of Revenue and pays an annual tax of $1,000.00 and builds a 20-foot wall around the premises."

In declaring that this statute was an unreasonable exercise of police power, the court observed that:

> "The basic standard by which the validity of all exercise of the police power is tested is that it extends only to such measures as are reasonable. A consideration of the entire legislation pertaining to nudist societies conclusively shows that the regulatory provisions set out therein are so unreasonable as to be prohibitory. The legislature did not see fit to prohibit the existence of nudist societies but merely sought to regulate them."

The Court in *Roe* further held that any regulation in the Kentucky statute must be reasonable and that a $1,000.00 fine and a 20-foot wall around the premises are requirements which are unreasonable, unduly oppressive and therefore unconstitutional.

In *In re Smith,* 143 Cal. 368, 77 Pac. 180 the court stated:

> "The law will not allow the rights of property or business to be invaded under the guise of police regulation for the benefits of public health or good order, when it is manifest that such is not the object or purpose of the enactment of by law. 'The question in each case,' says the Supreme Court of

> the United States, 'is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class.' "
>
> *Holden v. Hardy,* 169 U.S. 366, 28 S. Ct. 383, 4 L. Ed. 780.

Again, in *Merced County v. Fleming,* 111 Cal. 46, 43 Pac. 392, the Court said:

> "It is perfectly true that the power to (license and) regulate for the purposes of revenue is not the power to prohibit, and that an attempt to accomplish the latter object under a pretense of regulation cannot be upheld."

We have no quarrel with the position that the City of Hawaiian Gardens may reasonably regulate and license in the field of amusement and entertainment. But the City of Hawaiian Gardens cannot pass a body of ordinances which taken in its entirety is prohibitive of an activity not proscribed by the laws and courts of this State. Nor can the City of Hawaiian Gardens pass a body of ordinances which taken in its entirety is so unreasonable, discriminatory, and oppressive as to exceed the legitimate legislative powers of said city and unduly interfere with the petitioners' constitutionally protected personal and property rights.

The Appellate Department of the Los Angeles County Superior Court recently reversed a conviction for violations of a City of Norwalk ordinance which prohibited topless entertainment and also required a $1,500.00 license fee for such entertainment. *People v. Foley,* Cr. A. 7278, 7279 and 7280, Los Angeles Su-

perior Court Appellate Department, In its Memorandum Decision the Court suggested that:

"The vast disparity in fees charged for 'topless' . . . as compared with other forms of entertainment (Section 6310.8) suggests that the true purpose is prohibition, nor regulation."

III.

The Licensing Provisions Are Unconstitutionally Vague and Are Not Severable From the Permit Provisions.

In *People v. Jordan, supra,* the court stated that:

"The test of severability is whether the invalid parts of the legislation can be eliminated without ineffectuating the legislative scheme or purpose of the ordinance.

Blumenthal v. Board of Medical Examiners (1962), 57 Cal. 2d 228, 238;

People v. McCaughan (1957), 49 Cal. 2d 409, 416-417;

In re Portnoy (1942), 21 Cal. 2d 237, 242;

National Ice and Cold Storage Co. v. Pacific Fruit Express Co. (1938), 11 Cal. 2d 283, 293.

". . . ordinance No. 5860 Chapter I, contains a severance clause. We pay the dogma the respect due an aging principle, but we accord the severance clause little weight. It is common knowledge that severance clauses are routinely added as legislative 'boiler plate,' their absence is thus of greater significance.

"In ascertaining the purpose of the ordinance, we are not bound by the licensing label affixed to

> the measure, nor by recitals or provisions in the measure which describe the intent of the draftsmen, although each may provide some clue to the basic purport of the measure. We must independently examine the ordinance to decide whether the real purpose is regulation of a preempted field or licensing of a legitimate business. . . .
>
> "The legislative intent in enacting Ordinance 5860 can be gleaned, not only from the regulations previously discussed, but from the structure of the Ordinance. It is a criminal ordinance under which these defendants were criminally prosecuted."

People v. Jordan, supra, involved an appeal by the People when a demurrer was sustained by the trial court to the complaint. The defendant was charged with violating Section 2611 of the Ordinance 5860 for operating a "figure studio" without a license. The court held that the licensing provisions of the Ordinance *per se* were valid, but the regulatory features of the Ordinance impinged upon the criminal aspects of sexual conduct, obscene or lewd entertainment of exhibition and thus were void. The court then considered whether it could strike the offending regulation and retain the valid licensing provisions of the ordinance in question; the court concluded (p. 12):

> "The only persons who could be licensed to conduct a figure studio are those who conduct a business in which these regulations are pointless."

Section 30,003 of the Hawaiian Gardens Municipal Code provides that the $1,000.00 license fee "shall accompany the application (for an entertainment permit)," if a topless entertainer permit is sought. Ordinarily,

in statutory construction "shall" is mandatory and "may" indicates permissiveness.

Cannizo v. Guaranty Ins. Co., 245 A.C.A. 70, 53 Cal. Rptr. 657.

It is abundantly clear from the Hawaiian Gardens Municipal Code that an application for an entertainment permit will not be considered by the City Council unless the license fee is first paid. See Section 30,003 and 30,002(b) of the Hawaiian Gardens Municipal Code. To construe "shall" as "directory" in Section 30,003 would render it meaningless and ineffective, therefore it must be mandatory.

People v. Municipal Court of Oxnard-Port Huenemue Judicial District, Ventura County, 145 Cal. App. 2d 767, 303 Pac. 375; also see

Whitley v. Superior Court, 18 Cal. 2d 75, 113 P. 2d 449.

Moreover, the disparity between the $1,000.00 license fee for topless entertainment and other license fees, indicates the fee has a prohibitory purpose and its imposition constitutes invidious discrimination.

Ex parte Dees, 50 Cal. App. 11, 194 Pac. 717;

Roe v. Commonwealth, 485 S.W. 2d 25;

In re Smith, 143 Cal. 368, 77 Pac. 180;

People v. Foley, Los Angeles Superior Court Appellate Department, Cr. A. 7278, 7279 and 7280.

Under the circumstances, the void provisions may not be severed from the valid provisions without destroying the legislative scheme. Therefore, it is submitted that

the licensing and regulatory or permit provisions on topless entertainment should fall together.

People v. Jordan, supra, at page 13;

Fort v. Civil Service Commission, 61 Cal. 2d 331, 340;

In re Portnoy, 21 Cal. 2d 237, 242.

Further, the potential severability of an ordinance can have no effect on the cases in question. To petitioners, the existence of the Ordinance as a whole was an operative fact, until a separation has been made by judicial decision.

In re Porterfield, 28 Cal. 2d 91, 168 P. 2d 706, 724;

Smith v. Cahoon, 283 U.S. 553, 563, 51 S. Ct. 582, 586.

In *Smith v. Cahoon, supra,* the United States Supreme Court invalidated a portion of a Florida vehicle tax statute and reversed a conviction for operating a vehicle without a certificate of public convenience and necessity and without having paid a required tax. After noting that in order for a petitioner to obtain a license he would have had to have complied with the ordinance as written, the court stated that (283 U.S. 553, 563):

> "The effect of this saving clause is merely that, if one provision is struck down as invalid, others may stand. But, until such separation has been accomplished by judicial decision, the statute remains with its inclusive purport and those concerned in its application have no means of knowing definitely what eventually will be eliminated and what will be left."

Finally, it cannot be ascertained whether the permit and licensing requirements of the Hawaiian Gardens Municipal Code have any application at all to petitioners. Petitioner Perez was the manager at the business establishment and petitioner Schiffiler was an entertainer. A reasonable reading of the licensing and permit provisions would indicate that only the owner of the establishment is required to obtain a permit and license. Surely, it cannot be asserted that each petitioner is required to obtain a separate permit and license.

> "A criminal statute in terms so vague that a man of common intelligence must necessarily guess at its meaning and *differ as to its application* is for that reason unconstitutional." (Emphasis added.)
>
> *People v. Foley,* Los Angeles Superior Court Appellate Department No. Cr. A. 7278, Cr. A. 7279, Cr. A. 7280;
>
> *In re Davis,* 242, A.C.A. 760.

It is submitted that the licensing and permit provisions of the Hawaiian Gardens Municipal Code are patently uncertain with respect to their application to petitioners.

Conclusion.

This Court has not heretofore passed on the issues presented herein. It is therefore urged that this Court grant the Petition for Certiorari.

Respectfully submitted,

BERRIEN E. MOORE,
HIRAM W. KWAN,
RICHARD K. QUAN,
Attorneys for Petitioners.

APPENDIX "A".

Memorandum Opinion and Judgment.

Appellate Department of the Superior Court of the State of California, for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Francisco Perez, Joan Fae Schiffiler, Joan Fae Schiffiler, Joan Fae Schiffiler, etc., Joan Fae Schiffiler, Frenchy Mary Deschesnes, Defendants and Appellants. Superior Court Nos. CR A 7709, CR A 7710, CR A 7711, CR A 7712, CR A 7713, CR A 7714. Trial Court Nos. M 26350, M 26651, M 26747, M 26782, M 26786, M 26787.

Appeal by each defendant from judgment (order granting probation in case number CR A 7713) of the Municipal Court of the Los Cerritos Judicial District, Roberta Butzbach, Judge. Affirmed.

For Appellants—Berrien E. Moore.

For Respondent—Evelle J. Younger, District Attorney, Harry Wood, Chief, Appellate Division, Robert Lederman, Deputy District Attorney.

Each of these cases involves an appeal by the defendant from a judgment (Case number CR A 7713 is treated as an appeal from order granting probation), after a finding of guilty of a violation of subd. (w) of § 30005 of the Municipal Code of the City of Hawaiian Gardens. This section requires a *permit* for various types of activities, in the case of subd. (w) being the conducting of "topless entertainment". Section 30003 designates a charge of $15 for filing an application for a permit. It also requires that the *license fee* prescribed in Chapter 5 "shall accompany the application". The copy of the ordinance furnished us by the

City Clerk contains no Chapter 5. However, it does contain a Chapter 6 which does prescribe a *license fee* of $1,000 per year for "topless entertainment".

The complaint in each of the four cases involving the defendant Schiffiler originally charged the lack of a license or permit. In each of these cases the reference to a license was amended out charging only the lack of a permit. In the case involving the defendant Perez and that involving the defendant Deschesnes, the charge is as in the original complaint against the defendant Schiffiler, "without a license or permit". In each case the complaint refers to subd. (w) of § 30005 which does not purport to require a license but does require a permit. We treat the complaint, therefore, as involving only a permit. This reduces our inquiry to the limited issue of whether the requirement of subd. (w) of § 30005 is void and eliminates all questions as to subd. V of § 60002 as the defendants are not charged with violating that section.

We find no claim by any of the appellants that the permit fee as such is void. We agree that such claim could not be successfully made. (*People v. Kukkanen* (1967) 248 A.C.A. 450; *Robins v. County of Los Angeles* (1967) 248 A.C.A. 611.)

The judgment in each of the cases numbered CR A 7709, CR A 7710, CR A 7711, CR A 7712 and CR A 7714 is affirmed. The order granting probation in case numbered CR A 7713 is affirmed.

Dated 12/27/67

Vasey
Judge

We concur: Whyte, Presiding Judge, Meyer, Judge.

APPENDIX "B".

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

Feb. 8, 1968

Dear Sir: I have this day filed Order PETITION FOR WRIT OF HABEAS CORPUS DENIED.

In re: Crim. No. 11890, Perez, et al. on

Respectfully,

William I. Sullivan
Clerk